

FCC MAIL SECTION

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Before the
Federal Communications Commission
Washington, D.C. 20554DISPATCHED BY
MM Docket No. 93-53 ✓

In re Applications of

KR Partners File No. BPH-911001MB
(hereafter "KR")KES COMMUNICATIONS, File No. BPH-911903MH
INC.
(hereafter "KES")LORI LYNNE FORBES File No. BPH-911004MH
(hereafter "Forbes")For Construction Permit
for a New FM Station on Channel
256C in Waimea, Hawaii

HEARING DESIGNATION ORDER

Adopted: March 1, 1993;

Released: March 16, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

Preliminary Matters. On June 23, 1992, KR filed a petition for leave to amend its application. The amendment: (i) notes the withdrawal of George Handgis ("Handgis") as the source of KR's financing; (ii) revises the estimate of construction costs, and (iii) submits a new source of financing. The petition indicates that good cause exists for acceptance of the amendment, citing *Erwin O'Connor Broadcasting*, 22 FCC 2d 140 (Rev. Bd. 1970), because: (i) the amendment was pursued with due diligence; (ii) it was not required by the voluntary act of the applicant; (iii) it will not necessitate modification or addition of issues or parties; (iv) it will not disrupt the orderly conduct of the hearing nor necessitate an additional hearing; (v) it will not unfairly prejudice the other parties; and (vi) it will not cause the applicant to gain any comparative advantage.

2. On July 28, 1992, Forbes filed an opposition to KR's petition for leave to amend stating that, with respect to the source of financing, KR's amendment has not been timely

filed, and that insufficient information has been provided to warrant the formal acceptance of the amendment. Because the amendment was submitted after the last day for submitting amendments as of right, states Forbes, it is not acceptable at all under the reasoning of *Radio Representatives*, 5 FCC Rcd 3064 (M.M. Bur. 1990), since it pertains to the "grantability" of KR's application and it was not timely filed. Forbes also cites *Evans Broadcasting*, 5 FCC Rcd 1675 (M.M. Bur. 1990), in which the Commission rejected the applicant's amendment to its financial qualifications, finding that an amendment filed after the period for filing amendments as of right, even if it purported to reestablish an applicant's financial "grantability" qualifications, is not acceptable. Forbes also claims that "good cause" for acceptance of KR's amendment has not been established. Forbes alleges that no documentation has been provided evidencing the adequacy of Handgis initial financial assurances to KR, the "withdrawal" of Handgis' alleged assurances to KR or the existence of assurances from BDC Services, Inc. ("BDC"). Lacking evidence establishing the sufficiency of KR's initial financial qualifications, it is impossible for the Commission to establish that KR initially was financially qualified which, under *Albert E. Gary*, 5 FCC Rcd 6235, 6236 (Rev. Bd. 1990), and *Pepper Schultz*, 5 FCC Rcd 3273 (1990), prevents acceptance of its instant amendment. Additionally, Forbes states that, without providing evidence of the alleged assurances provided by BDC, KR has failed to make the requisite full financial showing which, under *Radio Representatives*, is required in order to permit favorable consideration of KR's request for the acceptance of its late-filed amendment. Forbes further alleges that since the amendment apparently was not diligently filed, that aspect of KR's amendment which seeks to reduce its budget estimates also cannot be accepted and that KR has presented no facts or basis supporting acceptance of its revised amendment. In short, Forbes alleges that: (i) KR's amendment represents an attempt to change and bolster its basic qualifications in a deficient untimely manner; (ii) it has failed to establish good cause for the amendment; and (iii) it failed to provide information necessary to evaluate the adequacy of the amendment.

3. 47 C.F.R. § 73.3522(a) (6) indicates that amendments filed after the period for filing amendments as of right "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514." The elements of good cause are those stated in *Erwin O'Connor* and cited by KR. While the Review Board has held that "[i]nitial financial qualifications are an important ingredient to a good cause showing for subsequent financial amendments," *Albert E. Gary*, 5 FCC Rcd 6235, 6236 (Rev. Bd. 1990) and the cited cases, we believe that the cases cited by Forbes do not warrant a finding that KR lacks good cause to amend its application.¹

4. Rather, we believe that KR has satisfied the six-part *O'Connor* good cause standard for its financial certification. First the amendment was pursued with due diligence: KR

¹ In *Radio Representatives*, applicant Irene Escalante stated in her original application that she was not financially qualified, then later attempted to amend after the date for amending as of right to demonstrate that she was financially qualified. That is not the case here. In *Evans*, applicant Evans Broadcasting withdrew its initial financial certification on April 21, 1988 and, over eight months later, attempted to re-certify its financial qualifications using 47 C.F.R. § 1.65. We held in *Evans* that

Section 1.65 requires applicants to maintain the continuing accuracy of the information contained in their applications. This rule does not, however, require the acceptance of such amendments when, as in the instant case, they cure an acceptability or grantability defect in the underlying application and the period for filing amendments as of right has already lapsed ... (w)e will

learned of Handgis' decision by his letter dated April 28, 1992, and received shortly thereafter. Therefore, the June 25 petition for leave to amend was filed with due diligence, especially in light of the fact that alternative financing had to be sought and achieved in a very short amount of time. Second, the amendment is not required by the voluntary act of the partnership. Rather, financial qualifications are a basic qualifying matter, and it was incumbent upon KR to file this amendment. Third, since the proceeding has not yet been designated for hearing, it will not necessitate the modification or addition of issues or parties. Fourth, it will not disrupt the orderly conduct of the hearing or necessitate any additional hearings. Fifth, the fact that the partnership has attempted to qualify itself financially by virtue of this amendment cannot unfairly prejudice any other party to the proceeding. Sixth, because the amendment addresses KR's basic qualifications to be a Commission licensee, it will not have any effect on the comparative merits of the various applicants. Furthermore, Forbes has provided no evidence that KR's original financial certification was erroneous or untrue. Forbes merely points to language in the amendment stating that prior to the April 28 letter withdrawing his offer of financing, "Ms. O'Connor had discussions with Mr. Handgis concerning doubts about his continued support, but not until its receipt was she finally advised that we could not rely upon his support." This does not countermand the showing demonstrated by KR with respect to the financial certification.

5. However, we believe that KR has not demonstrated good cause for its revised construction cost estimates. We have no demonstration for example, that KR acted with due diligence to revise those figures (or even what generated the revision), and the revision certainly was a voluntary act on KR's part. Therefore, we do not believe that acceptance of the construction cost revision is appropriate, and that portion of KR's amendment must be returned. With the acceptance of KR's new financial certification and return of the construction cost estimates, KR's certification does not meet its stated cost requirements. Therefore, a financial issue will be added.

6. *Other Matters.* Section II, Item 6 (old form) of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. KR has not completed Item 4 correctly. KR's application gives a post office box number as the residence address for it. Accordingly, KR must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

7. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such

areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to KR, whether the applicant is financially qualified.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, as indicated above, the petition for leave to amend, filed by KR on June 3, 1992, IS GRANTED IN PART AND DENIED IN ALL OTHER RESPECTS, and the amendment IS ACCEPTED IN PART AND RETURNED IN PART.

11. IT IS FURTHER ORDERED, That the opposition to KR's petition for leave to amend, filed by Forbes, on July 28, 1992, IS GRANTED IN PART AND IS DENIED IN ALL OTHER RESPECTS.

12. IT IS FURTHER ORDERED, That KR shall submit an amendment in accordance with paragraph 6 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

not allow applicants, under the guise of a 1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per §73.3522. Based on the foregoing, we find that Evans has failed to establish good cause for acceptance of its December 16, 1988 amendment.

5 FCC Rcd at 1677. Finally, both Gary and Schultz involved post-designation attempts to amend financial qualifications when the documentary evidence presented at hearing regarding the initial certification called into question "the basic condor and substance behind the original certification." 5 FCC Rcd at 6236. Here, as discussed further below, Forbes has presented no evidence that KR's original financial certification was inaccurate.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (*see* Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (*see* Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process (Report and Order in Gen. Doc. 90-264)*, 6 FCC Rcd 175, 160-1, 166, 168 (1990), *on reconsideration*, 6 FCC Rcd 3403, 3404 & n.3, Appendix paras 3 & 5 (1991).

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau